Chapter Three
Procedural Requirements

A. NOTICE

1. Applicability

If a meeting is subject to the Act, the public body must give "reasonable advance notice of the session." §10-506(a). In the case of an open meeting, the Court of Appeals has written, "[o]bservation by citizens is possible only when they have notice [of a planned meeting]."[1] Notice of the meeting is required, however, even if the session may be closed under one of the Act's exceptions. Moreover, notice of a scheduled meeting is required despite the presiding officer's anticipation that a quorum will not attend.[2]

2. Content

Unless some unusual circumstance makes it impracticable to do so, the public body should give a written notice that includes the date, time, and place of its meeting. If the body intends to conduct all or a part of its meeting in closed session, the notice should say so. §10-506(b). Although many public bodies have adopted the commendable practice of including an anticipated agenda in their meeting notice, this practice is not required by the Act. Hence, a variation from a previously announced

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[1] *Community and Labor United For Baltimore Charter Committee (CLUB) v. Baltimore City Board of Elections*, 377 Md. 183, 194, 832 A.2d 804 (2003).

[2] *CLUB v. Board of Elections*, 377 Md. at 195. *See also* 3 *OMCB Opinions* 314 (1993) (Opinion 03-13); 3 *OMCB Opinions* 92 (2001) (Opinion 01-4).

agenda (for example, by adding an item) is not a violation.[3] A meeting notice must be retained for at least one year after the date of the meeting. §10-506(d).

3. Method

The Act allows a range of methods for giving notice. If the public body is a unit of State government, it may publish its meeting notice in the Maryland Register. §10-506(c)(1). Any public body may give the required notice "by delivery to representatives of the news media who regularly report on sessions of the public body or the activities of the government of which the public body is a part." §10-506(c)(2).[4] "Delivery" implies an affirmative act; the public body may not rely on the happenstance that a reporter will learn of a meeting from some independent source.[5] In addition, "if the public body previously has given public notice that this method will be used," it may give notice "by posting or depositing the notice at a convenient public location at or near the place of the session" – typically, on a bulletin board outside the town hall or similar building. §10-506(c)(3).[6] Finally, a public body may give notice "by any other reasonable method." §10-506(c)(4).[7]

A public body has a duty to ensure that staff members do not mistakenly omit giving notice.[8] A public body also has a responsibility to notify the public if a previously scheduled meeting is canceled.[9]

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[3] *See* 3 *OMCB Opinions* 264 (2003) (Opinion 03-4); *2 OMCB Opinions* 52 (1999) (Opinion 99-7); 2 *OMCB Opinions* 31 (1998) (Opinion 98-9); *1 OMCB Opinions* 110 (1995) (Opinion 95-1); and 1 *OMCB Opinions* 16 (1992) (Opinion 92-5).

[4] *See, e.g.,* 3 *OMCB Opinions* 188 (2002) (Opinion 02-4).

[5] 4 *OMCB Opinions* 88 (2004).

[6] The place used for a posting might be consistent with what the public was previously told. 4 *OMCB Opinions* 88 (2004).

[7] Cable television might, under some circumstances, be a "reasonable method" of notice. 1 *OMCB Opinions* 166 (1996) (Opinion 96-5). A written version of the notice, however, should also be available to the public.

[8] 1 *OMCB Opinions* 44 (1993) (Opinion 93-8).

[9] 1 *OMCB Opinions* 186 (1996) (Opinion 96-11).

4. Timing

The Act does not mandate any particular period of advance notice. Undoubtedly, the General Assembly recognized that sometimes meetings have to be held on short notice, and the Compliance Board has ruled that, "absent evidence that a public body scheduled a meeting primarily to foil the public's right to attend and observe, the Compliance Board ordinarily will accept the determination ... that a meeting is needed at a particular time."[10] The rule of thumb, given the policies of the Act, is that notice of a future meeting should be given as soon as is practicable after the body has fixed the date, time, and place of its next meeting. If events require the prompt convening of a previously unscheduled meeting, the public body is to provide the best public notice feasible under the circumstances.[11] For example, the public body would be well-advised to provide immediate oral notice to reporters who are reasonably thought to be interested, and a written notice should be posted in the customary public place as quickly as possible.[12] Impromptu meeting or not, the Act's "procedures *must* be followed ... [for] any session of a public body that is within the scope of the Open Meetings Act."[13]

B. CHOICE OF MEETING SITE

The Act's statement of legislative policy calls on public bodies to hold meetings "in places reasonably accessible to individuals who would like to attend these meetings." §10-501(c). A public body may not meet in a room posted as off-limits to the public, even if a determined member of the public might be admitted despite the sign.[14] When a public body is considering where to meet, it should choose a room large enough to accommodate those members of the public and the press who are expected to attend. "That is, a public body would violate the Act if it had reason to expect a large

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[10] 4 *OMCB Opinions* 51, 56 (2004).

[11] *See* 1 *OMCB Opinions* 56 (1994) (Opinion 94-1).

[12] *4 OMCB Opinions* 6, 9 (2004); 1 *OMCB Opinions* 186 (1996) (Opinion 96-11); and 1 *OMCB Opinions* 183 (1996) (Opinion 96-10).

[13] 1 *OMCB Opinions* 20 (1993) (Opinion 93-1).

[14] 4 *OMCB Opinions* 147 (2005).

crowd but deliberately chose to meet in too small a space when a suitable, larger space was available."[15]

The location should be as convenient as possible for public attendance. "[T]he law would almost certainly be interpreted to preclude selection of a meeting location so distant and inconvenient as to prevent public attendance. Selection of such a site would subvert the policy of open meetings ...."[16] Further, the room should be accessible to members of the public with disabilities.[17] Individuals who are deaf may request that an interpreter be available at a public hearing; if feasible, the unit holding the hearing should provide the interpreter. §10-507.1.[18]

Should a larger crowd than expected attend, the body may move to a larger facility if one is readily available or may postpone the meeting until a larger space can be found. As the Compliance Board wrote:

> In our opinion, a public body, although not legally required to do so, *should* move a meeting to a larger room if the current meeting site cannot accommodate all who have arrived, a larger room is readily available, a request is made that the meeting be moved there, and moving the meeting would not interfere with the public body's ability to conduct its business. To move a meeting under these circumstance would advance the underlying goals of the Open Meetings Act without unduly burdening the public

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[15] 3 *OMCB Opinions* 118, 120 (2001) (Opinion 01-9).

[16] Ann Taylor Schwing, *Open Meeting Laws* §5.72, at 213.

[17] The Compliance Board has ruled that the Act is not violated if individuals with mobility impairments are provided assistance to attend a meeting in a facility that is not barrier-free. 1 *OMCB Opinions* 245 (1997) (Opinion 97-11). *See also* 3 *OMCB Opinions* 233, 235 (2002) (Opinion 02-13); 1 *OMCB Opinions* 237, 239 (1997) (Opinion 97-9). The Compliance Board did not address the impact of the Americans with Disabilities Act, the interpretation of which is outside the Compliance Board's jurisdiction.

[18] This provision, enacted by Chapter 31 of the Laws of Maryland 1997 as a recodification of former Article 30, §2, applies to all "units" within the Executive and Legislative Branches. The term "unit," although undefined, is broader than "public body." Although this provision does not itself apply to local units of government, compliance with it will avoid potential liability issues under the Americans with Disabilities Act.

> body. If a public body moves the meeting site, it should post a notice to that effect at the original location, so that latecomers will be directed to the proper place.[19]

C. VOTING REQUIREMENTS

In general, the Open Meetings Act does not lay out rules of parliamentary procedure.[20] It is not intended to supplant or substitute for a public body's own rules or guidelines, such as Robert's Rules of Order, for the conduct of meetings. In particular, the Act does not dictate how a public body organizes its consideration of issues that are permitted in closed session; it may meet for a closed session unconnected with an open session, or it may hold a closed session before or after an open session.[21] The notice of the closed meeting, however, should "make clear to members of the public that a meeting scheduled to begin at, for example, 9:00 a.m. will commence with a closed session, the open session to commence at 10:00 a.m."[22] Of course, a notice of this kind merely states an expectation; if the Act applies, the actual closing of the session requires compliance with the procedures discussed below.

The Act requires certain formal steps before a public body may meet in closed session.[23] First, the presiding officer must "conduct a recorded vote on the closing of the session." §10-508(d)(2)(i). In accordance with customary parliamentary procedures, this vote would occur on a motion, properly seconded, to close the meeting. The motion should state the legal basis for the proposed closing. The body may hold the closed session only if the motion is supported by a majority of the members present and voting. §10-508(d)(1). This vote must take place in an open session immediately

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[19] 3 *OMCB Opinions* 118, 121 (2001) (Opinion 01-9).

[20] 3 *OMCB Opinions* 264, 268 (2003) (Opinion 03-4).

[21] 3 *OMCB Opinions* 26 4, 268 (2003) (Opinion 03-4).

[22] 1 *OMCB Opinions* 23 (1993) (Opinion 93-2).

[23] If the public body is engaged in an administrative, judicial, or quasi-judicial function, it need not vote to close a meeting, because the Act ordinarily is inapplicable. *See* Chapter 2, Part C.

preceding the closed session.[24] "[T]hose who participate in a closed session are accountable for the decision to close."[25] Hence, a public body may not close a meeting based on a vote that occurred at a prior session.[26]

The presiding officer must ensure that a written statement is prepared setting out the reason for closing the meeting, the specific provision of the Open Meetings Act that allows the meeting to be closed, and the topics to be discussed at the closed session. §10-508(d)(2)(ii).[27] All justification for closing a meeting must be presented at this time. After-the-fact justifications, not presented contemporaneously with closing, are ineffective.[28]

While this written statement need not disclose sensitive information that the Act permits to be discussed in closed session, the statement ought to be more than "uninformative boilerplate."[29] This statement is a matter of public record and is to be sent to the Open Meeting Compliance Board if anyone objects to the closing of a meeting. §10-508(d)(3) and (4). An objection, however, is not itself a complaint to the Board, the procedures for which are summarized in Chapter 5. The written statement must be retained by the public body for at least one year after the date of the session. §10-508(d)(5).

D. MINUTES

The Open Meetings Act requires that public bodies keep written minutes of all of their meetings, open and closed, and retain them for at least one year. §10-509(b)

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[24] 3 *OMCB Opinions* 4 (2000) (Opinion 00-2);1 *OMCB Opinions* 191 (1996) (Opinion 96-12).

[25] 3 *OMCB Opinions* 4, 6 (2000) (Opinion 00-2).

[26] *Id.*

[27] A sample form for the required statement is set out in Appendix C.

[28] *See* 1 *OMCB Opinions* 117 (1995) (Opinion 95-03); 1 *OMCB Opinions* 96 (1994) (Opinion (4-7); 1 *OMCB Opinions* 73 (1994) (Opinion 94-5); and 1 *OMCB Opinions* 53 (1993) (Opinion 93-11).

[29] *See, e.g.,* 1 *OMCB Opinions* 23, 26 (1993) (Opinion 93-2).

and (e). The maintenance of untranscribed audiotapes does not suffice.[30] Minutes are to be prepared as soon as "practicable." §10-509(b). This requirement, the Compliance Board has opined, means that "[t]he cycle of minutes preparation should parallel the cycle of a public body's meetings, with only the lag time needed to draft and review minutes."[31] The Compliance Board found unlawful "routine delays of several months or longer in preparing minutes."[32] By contrast, the Compliance Board found that an interval of about five weeks between a meeting and the disclosure of minutes reflected "a reasonable preparation time."[33] The approved minutes of open meetings are publicly available. §10-509(d). Draft minutes, however, need not be disclosed.[34]

The Act requires that the following information be set out in the minutes, whether the meeting is open or closed: "each item" considered, the action taken on each item, and each recorded vote. §10-509(c)(1).[35] Although the Act does not specify the level of detail in the description of an "item," the description should be sufficient so that a member of the public who examines the minutes of an open meeting (or of a closed meeting, if the minutes are later released) can understand what the issue was.

A public body may, but is not required to, tape record a session. §10-509(c)(3)(i).[36] The minutes and any tape recording of a closed session are generally not open to public inspection, unless the majority of the public body votes in favor of disclosing them. §10-509(c)(4)(iii). When a public body has closed a meeting to discuss the investment of public funds or the marketing of public securities, however, the minutes and any tape recording of that portion of a closed session must be made available to the public after the transactions have occurred. §10-509(c)(4)(i) and (ii). The Act does not require that the minutes of a closed session be released after the

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[30] 2 *OMCB Opinions* 87, 90 (1999) (Opinion 99-18).

[31] 2 *OMCB Opinions* 87, 89 (1999) (Opinion 99-18). *See also* 4 *OMCB Opinions* 1 (2004); 4 *OMCB Opinions* 24 (2004); 3 *OMCB Opinions* 233 (2002) (Opinion 02-13).

[32] *Id. See also* 2 *OMCB Opinions* 11, 12 (1998) (Opinion 98-3).

[33] 3 *OMCB Opinions* 340, 342 (2003) (Opinion 03-18).

[34] 2 *OMCB Opinions* 13 (1998) (Opinion 98-3).

[35] *See* 1 *OMCB Opinions* 155 (1996) (Opinion 96-2).

[36] 4 *OMCB Opinions* 74 (2004).

completion of other transactions – for example, the purchase of real estate – but the public body might choose to make the minutes public at that time unless doing so would cause some harm (as, for example, if negotiations for a similar tract of land were still in progress). Minutes and any tape recordings are required to be maintained for at least one year after the meeting. §10-509(e).

Finally, the public body has a duty to disclose certain information about a closed meeting. The minutes of the next open meeting must include "a statement of the time, place, and purpose of the [previous] closed session," a record of how the members voted on the motion to close the session, a citation of the provision of the Act that allowed the meeting to be closed, and "a listing of the topics of discussion, persons present, and each action taken during the session." §10-509(c)(2).

The degree of detail in the minutes need not negate the confidentiality that the closed session was meant to preserve. For example, if disclosing the fact that a particular property was under consideration for acquisition might affect the price, the minutes need not disclose that information.[37] Another example relates to settlement proposals. Suppose that a public body closed a meeting to seek advice from its counsel about a settlement proposal in pending litigation. The statement in the minutes of the next open meeting need not disclose details like the nature of the proposal or the exact response of the public body.[38] At the same time, a public body must avoid the use of evasive boilerplate, a practice that does not meet the objective of §10-508(d)(2). A description that the topic of a closed meeting was, simply, a "personnel matter" would be impermissibly uninformative, because that description merely repeats the pertinent statutory text.[39] In the Compliance Board's example, a public body "might say (assuming this were the situation), 'Consideration of disciplinary action for alleged violations of municipal policy.' As this example indicates, there is a middle ground between identifying the individual whose personnel matter is involved, which is not

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[37] *See* 1 *OMCB Opinions* 110 (1995) (Opinion 95-1); 1 *OMCB Opinions* 73 (1994) (Opinion 94-5); and 1 *OMCB Opinions* 16 (1992) (Opinion 92-5).

[38] *See* 1 *OMCB Opinions* 73, 74 (1994) (Opinion 94-5).

[39] *See, e.g.,* 1 *OMCB Opinions* 110 (1995) (Opinion 95-1); and 1 *OMCB Opinions* 73 (1994) (Opinion 94-5).

required, and saying nothing more than the formulaic 'personnel matter,' which is impermissible."[40]

The preceding discussion is predicated on the assumption that the Act applied to the meeting in question. If a topic of discussion is excluded from the Act (*see* Chapter 2C), ordinarily no minutes at all need be kept.

Recent legislation, however, requires certain disclosures "if a public body recesses an open session to carry out an administrative function" in closed session. §10-503(c).[41] In that circumstance, the public body's next open meeting minutes are to contain "a statement of the date, time, place, and persons present at the administrative function meeting and a phrase or sentence identifying the subject matter discussed at ... meeting."

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[40] 4 *OMCB Opinions* 76, 78 (2004).

[41] Chapter 584 (House Bill 698) of the Laws of Maryland 2006.